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Supreme Court of the United States.

October Term, 1924.

THE UNITED STATES, *Appellant*,
v.
CHARLES A. MORROW. } No. 98.

Appeal From the Court of Claims.

BRIEF FOR APPELLEE.

I. STATEMENT OF THE CASE.

This claim was allowed by judgment of the Court of Claims, opinion by Judge Graham (record, pp. 4–6; reported 58 C. Cls. 20.)

II. BRIEF OF ARGUMENT.

1. Claimant Entitled under the Act.

The service of the claimant is directly within the description of the act of April 27, 1914 (Ch. 72, 38 Stat. 351, 355), quoted one-third down p. 4 of Rec.

He was during the period covered by the claim a clerk at headquarters of a territorial department. He is a native-born citizen of the United States, and the increase has been allowed him while serving in the Philippine Islands.

2. History of the Legislation.

It is objected that the benefits of the act do not ex-

tend to any clerks but those receiving statutory salaries. The history of the legislation shows the contrary.

The Secretary of War December 7, 1912, made a recommendation, which was repeated by his successor May 9, 1913, in which he recommended and commented upon a proposed insertion in the Army appropriation bill as follows:

"*Provided*, That the pay proper of all clerks and messengers provided for in this paragraph who are citizens of the United States shall be increased at the rate of twenty per centum per annum while serving in the Philippine Islands, such service to be computed from the date of departure from the continental limits of the United States to the date of return thereto.

"It is thought this will furnish a satisfactory remedy for the existing conditions, and is no more than the extra compensation which is now allowed enlisted men serving in the Philippine Islands, and will enable the War Department to retain in the services of desirable employees." (House Document #46, 63d Cong. 1st Sess. p. 2.)

The extra compensation so allowed enlisted men was the same rate, 20%, as here recommended (act of June 30, 1902, Ch. 1328, 32 Stat. 505, 512, quoted and construed in *United States* v. *Vulte*, 233 U. S. 509, 512.

This proposed amendment limited the increase to "clerks and messengers provided for *in this paragraph*."

It was adopted as a Senate amendment to the bill in a different form reading as follows:

"That on and after July 1, 1914, the pay of clerks and messengers at headquarters of territorial departments, tactical divisions, brigades and service schools, who are citizens of the United States, shall be increased 20 per cent while serving in the Philippine Islands, such service to be counted from the date of departure from

the continental limits of the United States to the date of return thereto:" etc.
(Congressional Record, Vol. 51, Part 6, p. 5592, Senate proceedings of March 27, 1914.)

The description of the persons was thus enlarged by the Senate amendment and the words recommended by the Secretary of War, "provided for in this paragraph," eliminated.

The amendment went to the conference and the conference committee struck out the words "20 per cent" and inserted in lieu thereof, "$200 each per annum." In this shape it became a law. Demonstration could hardly be more conclusive that Congress deliberately extended the description of the benefits of the legislation beyond those "provided for in this paragraph," to all "clerks and messengers at" Philippine Headquarters.

These changes of text in the course of the passage of the amendment through Congress are material were their meaning otherwise doubtful. (*Blake* v. *National Banks*, 23 Wall. 307, syllabus, Par. 2, p. 308, p. 319, two-thirds down.)

No good reason can be suggested for making any distinction between clerks having statutory salaries and those holding clerkships attached to the Quartermaster and other staff corps, and paid out of lump-sum appropriations. They were alike serving under conditions of a trying character to natives of the United States, thus described in *United States* v. *Thomas*, 195 U. S. 418, 421, 422:

"Shore duty beyond seas being an exceptional duty, both to officers of the army and navy, and being probably attended by increased expenditures, and dangers incident to a tropical climate, it is very natural that

Congress should award them both increased compensation."

Any reason that would apply to one would apply to the other. When the War Department recommended to Congress that only those clerks "provided for in this paragraph" should get the increase, Congress evidently thought it reasonable to grant it to all alike, whether provided for in that paragraph or somewhere else in the act.

The provision granting the increase as it stands in the statute (38 Stat. 355) is in a paragraph by itself, separated by a period from what goes before. The septence is complete in itself. It is an independent proposition of legislation.

Similar provisions have repeatedly been so construed.

In *United States* v. *Ewing*, 140 U. S. 142, an appropriation act provided (p. 148):

"Judicial: For fees of commissioners and justices of the peace acting as commissioners, $50,000: *Provided*, That for issuing any warrant or writ, and for any other necessary service commissioners may be paid the same compensation as is allowed to clerks for like services, but they shall not be entitled to any docket fees."

The language taking away docket fees was construed as general, and not limited to the particular appropriation.

It has never been suggested that this provision is of mere temporary effect as regards the two fiscal years for which appropriations were made in the acts of 1914 and 1915.

On the contrary, it has been treated as permanent and has only been recently repealed (*post*, pp. 5, 6).

As stated in *United States* v. *Whitridge*, 197 U. S. 135, 143:

"While no doubt the grammatical and logical scope of a proviso is confined to the subject-matter of the principal clause, we can not forget that in practice no such limit is observed, and when, as here, we are dealing with an addition made in new circumstances to a form of words adopted many years before, the general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down."

The Court of Claims said in *Scheid* v. *United States*, 52 C. Cls. 247, 256:

"But it can scarcely be concluded, because the particular appropriation must necessarily be limited to the uses of that particular branch of the service, that other language coupled therewith may not have a more general application."

In the present case the word "*Provided*" is preceded by a period, and begins a new paragraph. Congress meant what it said. The claimant, as demonstrated in the opinion of the Court of Claims, comes within the letter and spirit of the clause introduced by the word "*Provided.*" That is all that is necessary to entitle him to the benefit of the act.

The provision on which this claim is founded was repealed in 1923. The language of the repealing act is significant as showing what Congress then regarded as the scope of the act.

It is contained in the Army appropriation act, approved March 2, 1923 (Ch. 178, 42 Stat. 1377, 1384):

"The provision in the Act approved April 27, 1914, making appropriations for the support of the Army for the fiscal year ending June 30, 1915, that the pay of clerks and messengers at headquarters of territorial departments, tactical divisions, brigades and service schools, who are citizens of the United States, shall be

increased $200 each per annum while serving in the Philippine Islands, is hereby repealed."

This indicates that Congress regarded this provision as being as broad as its language would import and as extending to all clerks and messengers, citizens of the United States, serving at the Headquarters of the Philippine Department.

3. Applicable to Clerks Already in Philippines.

It is contended, however, that the concluding clause—

"such service to be computed from the date of departure from the continental limits of the United States to the date of return thereto,"

makes it necessary that a clerk should first be employed in the United States and go from there to the Philippine Islands to get the benefit of the act and that it does not apply to those whom the act of 1914 already found serving at Philippine Headquarters.

The language of the act bears no such construction.

The language as to departure from and return to the United States provides only for a mode of computation of the increase. The expression is copied from the provision granting 10 per cent increase to officers and 20 per cent increase to enlisted men serving beyond the limits of the states and territories of the United States by the act of 1902, construed by this court in *United States* v. *Vulte*, 233 U. S. 509, 512.

After that decision was rendered the question came before the Comptroller of the Treasury whether officers and enlisted men of the Porto Rico Regiment of Infantry, composed of natives of that island, and not

serving anywhere else, were entitled to the benefit of the increase the same as officers and enlisted men of the rest of the Army serving in the United States and who were only occasionally called upon to serve in Porto Rico.

Comptroller Downey, now Judge of the Court of Claims, held in the *Velez* case, 20 Comp. Dec. 821, 823:

"It appears that pursuant to this holding of the Comptroller you made a settlement of the claim of Raphael Velez, interpreting the opinion of the Supreme Court in the *Vulte* case as authorizing the payment of the claim, although Velez is an enlisted man in the Porto Rican Regiment of Infantry and performed his service in Porto Rico, while in the case decided by the Supreme Court, Vulte was an officer of the Marine Corps of the United States ordered to go from the United States to Porto Rico for duty in the latter place and subsequently returned to the United States. For the reasons stated in the decision to the Auditor for the Navy Department, I have reached the conclusion that the construction placed upon the statutes relating to foreign-service pay should be changed and that the principle announced by the Supreme Court is applicable, not only to the class of cases like that before the court, but also to a claim for pay by an enlisted man of the Porto Rican Regiment of Infantry serving in that country."

This ruling applies precisely to the question now before the court. It shows that under a statute like this granting an increase of pay on account of service in particular localities, it is not necessary for an officer in order to receive the benefits of the act to go from some other place to the place of service even though the statute may provide that the increase shall attach from the time of departure for such place until date of return therefrom.

4. Construction of War Department and Comptroller.

The construction placed upon the act by the War Department and by the Comptroller of the Treasury, beginning immediately after its passage and continuing for many years is material. As stated in *United States* v. *Moore*, 95 U. S. 760, 763:

"The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. *Edwards* v. *Darby*, 12 Wheaton, 210; *United States* v. *State Bank of North Carolina*, 6 Peters, 29; *United States* v. *MacDaniel*, 7 Id. 1. The officers concerned are usually able men and masters of the subject. Not infrequently they are the draftsmen of the laws they are afterwards called upon to interpret."

These remarks particularly apply to this case. Here, as we have seen, the provision in question was originally recommended by the War Department in one form and adopted by Congress in a materially different form.

The Manual for the Quartermaster Corps, U. S. Army, 1916, an official publication of the War Department, contained the following paragraph:

"218. The pay of clerks in the Quartermaster Corps of the Army transferred to the Philippine Islands after June 30, 1914, will be increased $200 per annum, to take effect on the date of departure from the continental limits of the United States; and the pay of clerks in the Quartermaster Corps of the Army transferred from the Philippine Islands to the United States will be reduced $200 per annum, to take effect on arrival within the continental limits of the United States. Approved by Secretary of War, June 12, 1914."

The date of approval by the Secretary of War here stated, June 12, 1914, was intermediate between that of enactment of this act, April 27, 1914, and the date of its taking effect, July 1, 1914, and it is made to take effect on that date. It conclusively shows that that officer construed the terms of the act as extending to clerks of the Quartermaster Corps.

The rulings of the Comptroller of the Treasury were to the same effect.

In the case of *Harry Peters*, 25 Comp. Dec. 578, while the claim was disallowed, no question was raised as to the application of the act to clerks of the Quartermaster Corps. On the contrary, reference was made to a decision of May 1, 1917, reported in 81 MS. Comp. Dec. 542, in the case of *Frederick L. Fink*, "who was employed as clerk in the land transport service of the Quartermaster's Department at Manila" "and as such was entitled to the benefits in question"; thus showing that the act was construed as extending to clerks of the Quartermaster Corps. An examination of the original decision in the *Fink* case shows that the claim was so allowed.

It was said in that decision:

"The date of his departure from the United States on his tour of duty as Clerk in the Philippine Islands was March 5, 1912, and the date of his return to the United States was March 18, 1915."

The Comptroller held:

"I find and certify that there is due from the United States to the claimant, Frederick L. Fink, the sum of $142.22, being additional pay under the act of April 27, 1914, *supra*, at the rate of $200 per annum, from July 1, 1914, to March 16, 1915, inclusive."

This was a ruling to the effect:

1. That clerks of the Quartermaster Corps are entitled to the benefit of the increase.

2. That the increase attaches from July 1, 1914, to clerks already serving in the Philippine Islands and that it was not necessary that they should go there after that date.

As late as March 2, 1923, the very date of the repealing act (*ante*, pp. 5, 6), the Comptroller General thus recognized the right of Quartermaster Corps employees in the Philippine Islands to the $200 a year increase (2 Comp. Gen. 525):

"It appears that regulations governing the compensation of Quartermaster Corps employees in the Philippines allow a $200 increase in their basic salaries while away from the United States. This increase is not a bonus specially provided and appropriated for in addition to the regular salary, but is an increase in the basic salary itself in the nature of temporary promotion while on Philippine duty," etc.

Any argument based upon a subsequent provision of the act (38 Stat. top p. 356, Chap. 72) "That no clerk, messenger, or laborer at headquarters of tactical divisions, military departments, brigades, service schools, and office of the Chief of Staff shall be assigned to duty with any bureau in the War Department," is based upon a misapprehension of the language.

The War Department exists only at Washington. Revised Statutes, Sec. 214:

"There shall be at the seat of Government, an Executive Department to be known as the Department of War, and a Secretary of War, who shall be the head thereof."

This court said in *Cooke* v. *United States*, 91 U. S. 389, 398, 399:

"The Department of the Treasury is by law located at the seat of Government as one of the executive departments, and the Secretary of the Treasury is its official head."

* * * * * * * * *

"Thus it is seen that all claims against the United States are to be settled and adjusted 'in the Treasury Department'; and that is located 'at the seat of government.'"

The Headquarters of the Philippine Department of the Army at Manila, constitutes no part of the War Department. The provision in question was adopted for an entirely different purpose. It was to prevent any of these clerks at the named headquarters being assigned to duty in the War Department at Washington to displace the civil service employees regularly serving in any of the bureaus of that department. It had no reference to any of the civil employees at the Manila Headquarters beyond prohibiting their transfer to Washington.

5. So Construed in This Case.

This very claimant presented a claim to the Auditor for the War Department. It was allowed and paid in the sum of $508.89. This conclusively shows that at the time of the allowance no doubt was entertained that the act extended to clerks attached to the Quartermaster Corps, who fulfilled the requirements, being citizens of the United States and serving at the headquarters of a territorial department in the Philippine Islands. After he had become a captain, Quartermaster Corps, in the Regular Army, the whole amount

was checked against and deducted from his pay as having been erroneously paid.

A construction like this, unsettling existing rights and requiring the repayment of money once drawn in good faith, should never be adopted if it is possible to avoid it.

This was strongly emphasized in *United States* v. *Alabama Railroad Co.* (142 U. S. 615, 621):

"We think the contemporaneous construction thus given by the executive department of the government, and continued for nine years through six different administrations of that department—a construction which though inconsistent with the literalism of the act, certainly consorts with the equities of the case—should be considered as decisive in this suit. It is a settled doctrine of this court that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced. It is especially objectionable that a construction of a statute favorable to the individual citizen should be changed in such manner as to become retroactive, and to require from him the repayment of moneys to which he had supposed himself entitled, and upon the expectation of which he had made his contracts with the government. These principles were announced as early as 1827 in *Edwards' Lessee* v. *Darby*, 12 Wheaton, 206, 210, and have been steadily adhered to in subsequent decisions. *United States* v. *State Bank of North Carolina*, 6 Peters, 29, 39; *United States* v. *MacDaniel*, 7 Peters, 1; *Brown* v. *United States*, 113 U. S. 568; *United States* v. *Moore*, 95 U. S. 760, 763."

If this is so in the case of a railroad corporation ac-

quiring rights, much more must it be the case in regard to an officer, whether civil, as was this claimant at the time he received the amount, or military, as he was when it was taken away from him. This for the reason quaintly stated in *Corporation of Liverpool* v. *Wright*, L. J. Eq. 28, N. S. 868: "because the law presumes, with reference to an office of trust, that he requires the payment which the law has assigned to him for the purpose of upholding the dignity and performing properly the duties of that office."

6. Deduction of pay Illegal.

An amount once paid an officer can not lawfully be questioned, much less arbitrarily deducted from pay subsequently accruing to him as a commissioned officer of the Army. It is found, last Par. Finding II (Rec. foot p. 3):

"Still later said amount $508.89, was checked against him as having been erroneously paid and was deducted from his subsequently accruing pay as a captain, Quartermaster Corps, Regular Army, and has never been restored to him."

This court has quoted with approval an opinion of the Attorney General saying "Without specific authority no portion of the salary of an officer of the United States may be withheld" (*Smith* v. *Jackson*, 246 U. S. 388, 389).

A portion of the payment of the $508.89, on which the claim was made, rests upon even higher authority than that of the accounting office. A part of that claim was covered by current appropriation and was paid therefrom. That portion involving the first $200 due for the fiscal year ending June 30, 1915, was reported to Congress in compliance with the act of July 7, 1884, Ch. 334 (23 Stat. 236, 254) (House Doc. #1186, 65th Con-

gress, 2d Sess., "Claims Allowed by Accounting Officers of the Treasury," p. 49). By the deficiency act of July 8, 1918, Ch. 139 (40 Stat. 821), Sec. 2 (pp. 837, 838), appropriations were made for the payment of all the claims "fully set forth in House Document Numbered 1186, reported to Congress at its present session."

In *United States* v. *Louisville* (169 U. S. 249), the accounting officers of the Treasury had adjudicated a claim, made an allowance thereon, and the amount allowed had been reported to Congress by the Secretary of the Treasury, and Congress, in a deficiency appropriation act, had appropriated a specific sum to pay the claim. Thereafter the accounting officers concluded that an erroneous amount had been allowed, and endeavored to reopen the settlement for the purpose of making certain deductions. But in holding that they were without jurisdiction to do so this court said (pp. 253, 254):

"When the decision of these officials was by the Secretary of the Treasury reported to Congress and an appropriation made by that body in 1891 of the specific sum mentioned in the report, with directions to pay the amount thus appropriated to the city of Louisville, the time for examination had passed, and it was the duty of the proper officers of the Government to pay the money as directed by the statute."

"The act of 1891 was in the nature of a judgment, final in its character, and subject to no appeal, and the duties of the officers of the Government thereafter charged with the payment of the moneys appropriated by that act were not discretionary, and were limited to the clerical functions of making payment, as directed by the act."

The payment of $200 of this amount was thus made under specific authority of an appropriation by Congress to this claimant. It thereby passed beyond the jurisdiction of any executive officer of the Government.

Since it is impossible to distinguish in principle between the $200 thus allowed and specifically appropriated for by Congress and the remaining balance of $308.89 paid under current appropriation, it follows that there was no authority for checking any part of this sum against the claimant.

It is stated in the brief for the United States (p. 3) that the decision in this case will control a large number of similar claims. If by this is meant that other officers, either civil or military, have had hundreds of dollars at a time checked against them and arbitrarily deducted from their pay after once receiving the amounts involved in good faith under existing rulings and presumably spending the sums so received for the support of themselves and their families, it only illustrates the wide-spread injustice which would result from sanctioning the setting aside of a long-settled construction of this act of 1914 acquiesced in for many years and only recently challenged.

7. Conclusion.

1. The act of 1914–1915 extended by its very terms to clerks and messengers at headquarters who are citizens of the United States serving in the Philippine Islands.

This claimant is within the exact description of the act.

2. The act was from the beginning so construed, both in general terms and as applied to this particular case which was allowed and paid.

For both these reasons the judgment of the Court of Claims should be affirmed.

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